

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
TWENTY-SIXTH REGION**

**IRVING MATERIALS, INC.,  
Employer**

**and**

**Case No. 26-UC-184**

**TEAMSTERS LOCAL UNION NO. 89  
Petitioner**

**DECISION AND ORDER**

Upon a petition duly filed under §9(b) of the National Labor Relations Act, as amended, a hearing was held before a Hearing Officer of the National Labor Relations Board on May 24 and 25, 2000, at Nashville, Tennessee. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.<sup>1</sup>

Pursuant to the provisions of §3(b) of the Act, the Board has delegated its authority in connection with this case to the undersigned Regional Director.

Upon the entire record in this case,<sup>2</sup> the Regional Director finds:

**1.**

The Employer is an Indiana corporation with places of businesses in Bowling Green, Franklin, Morgantown and Scottsville, Kentucky, where it is engaged in the manufacture and delivery of concrete.

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<sup>1</sup> The Hearing Officer referred the Petitioner's motion to summarily clarify the unit to include the individuals at issue. The Petitioner argued the Employer's failure to challenge the ballots of the disputed individuals essentially operated as a waiver of its right to later contest the inclusion of these individuals in the unit. I find that the Hearing Officer properly continued with the hearing. Moreover, as more fully detailed in my decision herein, the record establishes that in the underlying representation case the Employer contested the inclusion of the disputed individuals into the unit. The Board Agent pursuant to §11338 of the NLRB Casehandling Manual properly challenged their ballots. Under these circumstances, I find that the instant unit clarification proceeding is appropriate and I am therefore, denying the Petitioner's motion. See, *Kirkhill Rubber Company*, 306 NLRB 559 (1992) and cases cited therein at fn. 2.

<sup>2</sup> Briefs from both parties have been timely filed and duly considered.

**2.**

The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

**3.**

The Employer and Petitioner have an established bargaining relationship at other production facilities in Kentucky and Indiana. However, prior to November 1999, the Union did not represent the employees employed at the facilities at issue herein. The record establishes that on September 23, 1999 the Petitioner Union filed a petition in Case 26-RC-8121 seeking to represent employees employed in the following unit

**Included:** Loader operators, batchmen, drivers, plant maintenance and mechanics at Bowling Green, Franklin, Morgantown and Scottsville.

**Excluded:** Superintendents, foreman, dispatchers, office/clerical, guards and all others excluded by the Act.

The parties subsequently entered into a Stipulated Election Agreement, which was approved by the Regional Director for Region Twenty-Six on October 8, 1999. The parties agreed to a mail ballot election for employees employed in the following:

**Included:** All drivers, load operators, maintenance, and mechanics at the Employer's Bowling Green, Franklin, Morgantown and Scottsville, Kentucky facilities.

**Excluded:** All dispatchers, office clericals, clerical employees, foreman, guards, and supervisors, as defined in the Act.

The record establishes that the Employer subsequently submitted the Excelsior List. Among the employee names listed was the name of Ralph J. Tubolino, who is one of the individuals at issue herein. The Employer noted on the list that it protested

Tubolino's eligibility to vote on the basis that he supervised other employees. The names of the four remaining disputed individuals were not included on the original Excelsior List. However, the record establishes that following telephone conversations between the Employer and the Petitioner, the Employer by letter dated October 20, 1999, submitted the names and addresses of the four remaining individuals to be included as part of the Excelsior List. The Employer noted in the letter that it planned to protest the eligibility of the individuals based upon their supervisory status. Thereafter, the five disputed individuals cast mail ballots. The tally of ballots was conducted on November 9, 1999. The Employer did not have a representative present for the vote count. The record establishes that the Board Agent challenged the ballots of the disputed individuals. On November 17, 1999, the Petitioner Union was certified as the exclusive collective bargaining representative of employees employed in the unit as described in the Stipulated Election Agreement. Although the ballots of the individuals at issue herein were not determinative of the outcome of the election, their supervisory status remained unresolved.

Thereafter, on April 24, 2000, the Petitioner filed the instant petition seeking to clarify the unit to include five individuals employed as batchmen at the Bowling Green, Franklin, Morgantown and Scottsville, facilities. It is the Petitioner's contention that these individuals are merely rank and file employees who should be included in the unit. Conversely, the Employer takes the position that the individuals are plant managers, and thus, should be excluded from the unit because of their supervisory status. The disputed individuals and their assigned facilities are:

Michael Oakes	-	Scottsville
Michael Jones	-	Franklin

Kevin Hatcher	-	Morgantown
Darrell Charlton	-	Bowling Green (Barren Road Plant)
Ralph Tubolino	-	Bowling Green (Fairview Road Plant)

#### 4.

The record establishes that the five disputed individuals are charged with the responsibility of the day to day operation of their respective facilities. Each of the batchmen has keys to his particular facility. Moreover, each has his own office where personnel files and various types of paperwork are maintained. The number of employees at each plant varies. Specifically, at the Bowling Green (Fairview Road) facility there are six drivers and one load operator, in addition to Tubolino. Charlton, a quality control employee, a sales person and six drivers, are assigned to the other Bowling Green (Barren Road) facility. Jones and two employee drivers are assigned to the Franklin facility. Likewise, Oakes, and two drivers are employed at the Scottsville facility. Finally, Hatcher and three drivers are employed at the Morgantown facility.

The batchmen work in tandem with the drivers (unit employees) in getting the product to the customer. In this regard, the batchmen are responsible for the actual batching or mixing of the concrete. The drivers transport the final product to the customer. Customer orders determine the length of the workday and the amount of concrete prepared each day. While each plant is run similarly, testimonial evidence reveals that Hatcher, Jones, and Oakes, have the additional responsibilities of acting as dispatcher for their respective facilities. Additionally, the record indicates they have significantly more customer contact than the other two batchmen. In that regard, their testimony establishes that they are responsible for taking orders directly from customers.

Conversely, Tubolino and Charlton receive their orders directly from the dispatcher, Steve Hoff. Hoff's office is located at the Bowling Green (Barren River Road) facility.

The dispatcher is responsible for scheduling deliveries for the drivers. For the most part, drivers are assigned loads based upon seniority.<sup>3</sup> Thus, the first load is assigned to the most senior driver. The next load would be assigned to the second senior driver and the process continues until each load is assigned. After the initial assignment, the loads are assigned to the drivers as they return to the facility.

Donald Reynolds is employed as the Area Manager for the Employer and is the immediate supervisor of the five batchmen. His office is located in Louisville, Kentucky. The testimony adduced during the hearing establishes that depending upon the circumstances at a particular plant, Reynolds may have daily telephone contact with the batchmen. At other times his contact may be as infrequently as once every six to eight weeks. When he visits the plants he discusses with the batchmen issues pertaining to personnel and production matters. Reynolds is consulted on most major issues. Specifically, he has final authority concerning personnel and production matters at each facility. The record also establishes that Eddie Beane, sales person in Bowling Green, is also contacted when the batchmen have personnel or other problems.

All of the batchmen, with the exception of Charlton, testified at the hearing concerning their duties and authorities. They also testified concerning benefits they received. Each testified that upon assuming his current position he received a wage increase. The increases ranged in amounts from fifty cents to one dollar and fifty cents. Thus, the batchmen's wages are slightly higher than all but the most senior drivers. Each of the five individuals punches a time clock and is hourly paid, as are the bargaining unit

employees.<sup>4</sup> Moreover, they receive overtime in the same manner as the unit employees. They receive the same fringe benefits as unit employees. Additionally, they wear the same uniforms<sup>5</sup> as hourly employees. The record establishes that the disputed employees and the unit employees frequently eat lunch together.

Hatcher, Jones, Oakes, and Tubolino, testified that they have the authority to send the drivers out on deliveries, and to direct the drivers to load bins, to clean their trucks or to perform general clean up chores, such as shoveling or sweeping around the plant during idle time. Moreover, each testified that he is responsible for ensuring the accuracy of time records and submitting said records to the corporate office. The record also establishes that each of the individuals has the authority to obligate the Employer financially. In this regard, Oakes testified that he had the authority to order materials valued between \$10,000 and \$40,000 each month. He does not have to have the approval of management before making such purchases. Similarly, Hatcher testified that he has the authority to order materials. He estimated that he has made purchases up to \$20,000 a month without prior approval of management. The record also establishes that the batchmen have the authority to authorize wrecker services, which can range from \$300 to \$500. Furthermore, batchmen are responsible for completing cash receipts and making daily bank deposits on behalf of the Employer.

Each of the batchmen also testified concerning management meetings he attended. These meetings are held annually and the Employer pays for the expenses

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<sup>3</sup> Oakes testified that he honors a customer's request for a particular driver.

<sup>4</sup> The record establishes that in addition to an hourly wage, the drivers also receive a bonus. With the exception of Oakes, none of the individuals at issue receive a bonus. The record establishes that upon being promoted to the batchman/plant manager position, Oakes opted to receive a bonus for the amount of concrete batched, as opposed to the customary wage increase.

<sup>5</sup> The record establishes that employees may elect to wear either employer issued uniforms or tee shirts and jeans.

associated with attendance. The record establishes that the highest members of management attend these meetings. There is no evidence that any unit employees are present at the meetings. In addition to information pertaining to the production of concrete, other issues discussed include, employee benefit plans, various operational concerns, production levels and sales.

In addition to the foregoing, Oakes testified that he had the authority to approve leave requests. In this regard, it was his testimony that if a driver requested to leave work early he could approve such request without consulting with management. Hatcher also testified that he had the authority to grant time off and that employees report absences to him.

Furthermore, the record establishes that the batchmen have the authority to transfer employees. Hatcher testified that if one of the other facilities needed assistance he had the authority to send drivers to the location where assistance is needed. Jones similarly testified that he authorized the transfer of employee Jerry Birdwell from his Franklin plant to the Scottsville plant. According to Jones, Birdwell was originally assigned to a facility in Smithville. Someone from that facility contacted Jones, recommending Birdwell for a transfer to Jones' plant. Jones needed a driver at the time and agreed to the transfer of Birdwell. According to Jones, he informed Salesman Beane that he had located a driver who would be transferring to the facility. Beane approved the transfer. Three months later Birdwell requested a transfer to the Scottsville facility, where Oakes is the batchman. Jones contacted Oakes to see if he wanted the driver there. According to Jones, Birdwell transferred to the Scottsville facility that same day.

Area Manager Reynolds testified that each of the batchmen has the authority to both recommend disciplinary action and to discipline employees. With the exception of Tubolino, each of the other batchmen who testified, confirmed that he had such authority. Specifically, Oakes testified that he terminated an employee, Raul Vidal. According to Oakes, he had several problems with Vidal, which had been documented. When Oakes determined that Vidal was not a satisfactory employee, he made the decision to terminate him. Prior to the actual termination, Oakes contacted Reynolds and apprised him of the situation. Oakes provided Reynolds with a written list of the problems he had experienced with Vidal. Reynolds concurred with the decision to terminate Vidal. Moreover, there was no evidence that Reynolds conducted any additional investigation prior to concurring with Oakes' decision to terminate Vidal.

Likewise, Hatcher testified that he had the authority to issue discipline ranging from a warning up to discharge. Moreover, documentary evidence was introduced establishing that Hatcher exercised his authority to discipline employees. Specifically, in November 1996, Hatcher issued a written warning to employee, Charles Morgan, for violation of company policies. In October 1997, Hatcher issued a three day suspension to Morgan for being late with a delivery. Finally, in March 1999, Hatcher issued a written warning to Morgan for delivering wet concrete. Hatcher testified that in each instance he issued the discipline at his own discretion and not pursuant to any directive from upper management.

In addition to their involvement in disciplinary action, the record establishes that batchmen also play a role in the interview and hire of applicants for employment. The batchmen provide applicants with employment applications and conduct the initial



interviews with applicants. Generally, the applications are faxed to Area Manager Reynolds, who is usually involved in any subsequent interview. Hatcher testified concerning the recent hiring of a driver. According to Hatcher, the employee, Randal Evans, initially applied for a position in January 2000. However, work was slow at the time and Hatcher told him that he would contact him when work picked up. Once work picked up, around April, Hatcher contacted Evans. Hatcher testified he was short a driver and made the decision to hire Evans. It was Hatcher's testimony that he told Reynolds that Evans was the individual he wanted to hire. Reynolds participated in the second interview of Evans. However, it was Reynolds' testimony that Hatcher was the person who made the decision to hire Evans. Reynolds further testified that each of the batchmen had the authority to recommend for hire and to hire applicants for employment.

The record establishes that the disputed individuals are paid in a similar manner as unit employees, receive the same benefits, wear the same uniforms, and play an integral role, along with the unit employees in the manufacture/delivery of the Employer's product. Thus, I agree with the Petitioner that the batchmen share some community of interest with the unit employees. On the other hand, in reaching my conclusion regarding the status of the batchmen, I note that they possess and exercise certain indicia of managerial employees. Specifically, (a) the batchmen all have keys to their respective facilities; (b) each has a separate office where personnel records and other company documents are maintained; and (c) each is required to attend an annual meeting, attended by only those in management. While I make no finding concerning the managerial status of the disputed individuals, I find that the foregoing factors at a minimum raise different community of interest issues.

However, the inquiry as to whether these individuals should properly be included in the unit does not end here. Rather, resolution of the unit issue turns on the supervisory status of the batchmen. I am convinced that the testimonial and documentary evidence before me warrants exclusion of the disputed individuals from the unit. Thus, contrary to the Petitioner's assertions, I find that the evidence is sufficient to support a finding that the batchmen are supervisors within the meaning of the Act.

§2(11) of the act defines a supervisor as being "any individual having authority, in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." It is well established that possession of any one of the foregoing powers is sufficient to confer supervisory status. It is equally settled that §2(11)'s disjunctive listing of supervisory indicia does not alter the essential conjunctive requirement that a supervisor must exercise independent judgment in performing the enumerated functions. *T. K. Harvin & Sons, Inc.*, 316 NLRB 510, 530 (1995); *Hydro Conduit Corp.*, 254 NLRB 433, 436-437 (1981); and, *NLRB v. Wilson-Crissman Cadillac*, 659 F.2d 728 (6<sup>th</sup> Cir. 1981). Thus, to be found a supervisor, an individual must exercise one of the enumerated §2(11) powers over particular employees.

While it is undisputed that the batchmen have the authority to assign work, I find the record insufficient to establish that their exercise of this authority rises to the level of §2(11) authority. Notwithstanding the foregoing, I find the record establishes that the batchmen are supervisors as defined by the Act. In concluding that the batchmen are

supervisors, I find unpersuasive Petitioner's argument that *Cook Composites and Polymers Co.*, 313 NLRB 1105 (1994) and *Olinkraft, Inc.*, 179 NLRB 414 (1969), are controlling and dictate a finding that the individuals at issue are employees. There was no evidence in either of the foregoing cases that the individuals at issue exercised any enumerated §2(11) authority. Thus, those cases differ from the situation presented by the instant case. While Petitioner acknowledges that the Employer has demonstrated instances of the exercise of supervisory authority, Petitioner nevertheless, argues that said evidence demonstrates any exercise of authority is isolated and does not elevate batchers to a supervisory level. In support thereof, Petitioner relies on *Commercial Fleet Wash*, 190 NLRB 326 (1971). Again, Petitioner's reliance is misplaced as the record establishes that the authority of the batchers to discipline or to make recommendations concerning disciplinary action is not limited to a few isolated incidents.

Similarly, Petitioner's argument that the unit should be clarified to include the disputed individuals because batchers at other facilities are included in the bargaining unit is unpersuasive. First of all, there was no evidence adduced during the hearing to establish that the authorities of batchers at other unionized facilities are the same as those of the individuals at issue herein. Moreover, the bargaining pattern at other plants of the same employer will not be considered controlling in relation to the bargaining unit of a particular plant. *Big Y Foods*, 238 NLRB 855 (1978); *Miller & Miller Motor Freight Lines*, 101 NLRB 581 (1963).

Based on the record before me, I find that the batchmen possess and exercise several enumerated §2(11) powers. Namely, the authority to discipline employees, and/or to make effective recommendations concerning disciplinary actions. This is borne

out through the testimony of Reynolds, Hatcher and Oakes. Moreover, the batchmen have the authority to transfer employees, and to make effective recommendations concerning the transfer of employees, as evidenced by Jones' testimony concerning the transfer of employee Birdwell. Additionally, in concluding that the batchmen are statutory supervisors, I have also considered the role the batchmen play in the hiring of applicants for employment, the fact that batchmen approve leave requests and ensure the accuracy of attendance records. Finally, the overwhelming evidence establishes that in performing the foregoing functions, the batchers exercise independent judgment. Accordingly, I shall dismiss the petition.

### **ORDER**

It is hereby ordered that the petition filed herein be, and it hereby is, dismissed.<sup>6</sup>

**Dated** at Memphis, Tennessee this 25<sup>th</sup> day of August, 2000.

/S/

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Ronald K. Hooks, Regional Director  
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### **CLASSIFICATION INDEX**

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177-8520-0100  
177-8520-4700  
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385-7533-2020

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<sup>6</sup> Under the provisions of § 102.67 of the Board's Rules and Regulations, a Request for Review of this Decision may be filed with the Board in Washington, D.C. This request must be received by the Board in Washington by September 8, 2000. Any party may waive its right to request review by signing the attached waiver from and submitting it to the Board in Washington with a copy to the Regional Director.